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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

(Hon. Thomas J. Whelan)

UNITED STATES OF AMERICA,

Plaintiff,

v.

DUNCAN D. HUNTER,

Defendant.

Case No. 18-CR-3677-W

**NOTICE OF MOTION AND MOTION
TO DISMISS COUNTS 45-57 FOR
FAILURE TO STATE AN OFFENSE**

DATE: July 1, 2019
TIME: 10:00 a.m.
COURTROOM: 3C
JUDGE: Hon. Thomas J. Whelan

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on July 1, 2019 at 10:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Thomas J. Whelan, United States District Court Judge, Courtroom 3C, located at 221 West Broadway, San Diego, California, 92101, Defendant Duncan D. Hunter hereby moves to dismiss Counts 45 through 57 of the indictment in this case pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v).

This Motion is based on the instant Notice, Motion, and Memorandum of Points and Authorities submitted herewith, the pleadings and other matters on file in this case,

1 and on such other and further argument and evidence as may be presented to the Court
2 at the hearing of this matter.

3
4 Dated: June 24, 2019

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A Law Corporation

5 Bv: s/ Gregory A. Vega

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UNITED STATES OF AMERICA,

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**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS COUNTS 45–
57 FOR FAILURE TO STATE AN
OFFENSE**

Date: July 1, 2019
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Judge: Hon. Thomas J. Whelan

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Defendant DUNCAN D. HUNTER (“Hunter”), by and through his attorneys, Gregory A. Vega, Ricardo Arias and Philip B. Adams respectfully moves the Court to dismiss Counts 45 through 57 of the indictment in this case pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v). Counts 45 through 57, which charge Hunter with violations of 18 U.S.C. §§ 1519 and 2, improperly apply the twenty-year felony offense in the Sarbanes-Oxley Act to routine campaign filings with the Federal Election Commission (“FEC”). These counts fail to state an offense because they are unconstitutionally vague as applied to FEC disclosure reports, infringe Hunter’s constitutional rights both as an individual and as a United States Representative, and upset the careful legal and regulatory framework Congress crafted in the Federal Election Campaign Act (“FECA”) to balance campaign regulation and core First Amendment political activity.

I. INTRODUCTION

Counts 45 through 57 of the indictment charge Hunter and his wife, Margaret Hunter (“Mrs. Hunter”), with “Falsification of Records Related to Campaign Finance” in violation of 18 U.S.C. §§ 1519 and 2. Specifically, the government alleges that Mr. and Mrs. Hunter (collectively “the Hunters”) knowingly falsified and made false entries within FEC Form 3, Report of Receipts and Disbursements (“FEC Form 3”) with “the intent to impede, obstruct, and influence the investigation and proper administration of matters within the jurisdiction of the Federal Election Commission and the Federal Bureau of Investigation” (“FBI”). The basis of these charges is unclear, however, as each Count merely lists a separate FEC Form 3 report submitted by the Hunter campaign, without explanation as to the alleged false entry contained within the report. Similarly, indictment paragraphs 1-17, which the government re-alleged and incorporated into Counts 45-57, do not specify which entries within each report qualify as a false entry and do not contend that the FEC deemed any of the entries within the thirteen FEC Form 3 reports at issue inaccurate.

Instead, these counts appear to rest on the government’s theory that certain

1 unspecified descriptions of undisclosed expenditures did not meet the government's
 2 own reporting standards, which were crafted by prosecutors for purposes of this
 3 prosecution and never publicly disclosed. By applying its own undisclosed
 4 interpretation of the FEC's reporting rules without guidance from the FEC experts, the
 5 government violated the Due Process Clause by permitting its prosecutors usurp
 6 legislative authority. Rather than relying on instructions from Congress or the FEC on
 7 how to properly make campaign disclosures, the indictment alleges, without
 8 explanation, that Hunter made false statements within his FEC Form 3 reports,
 9 presumably based on the prosecutors' own interpretations of FEC reporting
 10 requirements. Moreover, even if the FEC had determined that Hunter's FEC Form 3
 11 reports contained inaccurate descriptions in violation of the FECA, section 1519 has no
 12 application to violations of the FECA, which has carefully designed internal
 13 mechanisms for regulating, enforcing and punishing such conduct.

14 Preliminarily, the due process violations here are particularly problematic because
 15 the indictment treads on ground protected by the First Amendment, which "has its
 16 fullest and most urgent application precisely to the conduct of campaigns for political
 17 office." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). The regulation of campaign contri-
 18 butions and expenditures "operate[s] in an area of the most fundamental First
 19 Amendment activities." *Id.* at 14. Even requiring the disclosure of those contributions
 20 and expenditures "has the potential for substantially infringing the exercise of
 21 First Amendment rights" by chilling protected speech and discouraging political
 22 association. *Id.* at 66.

23 In essence, these counts are based on a broad criminal obstruction statute
 24 combined with the prosecutors' own interpretations of the reporting requirements of the
 25 FECA—an act that Congress created for the express purpose of governing the reports
 26 Hunter is charged with falsifying. Embedded in the FECA's expenditure reporting
 27 requirements is a comprehensive legal and regulatory regime in which errors or even
 28 knowing false statements on campaign forms are addressed through an established

administrative process. Congress also declined to nitpick which campaign expenses were permissible and how they were described by generally allowing all expenditures other than for the candidate's personal use, which 52 U.S.C. 30114(b)(2) describes as any use of campaign funds used to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election or individual's duties as a holder of Federal office." Notably, however, even in the context of alleged personal use of campaign funds, criminal penalties—even the suggestion of which can be an unreviewable knock-out blow to candidates for elected office—are reserved for knowing and *willful* false statements. But even then, willful misstatements begin only as a misdemeanor and rise, based on the amount of money involved in the offense, to a maximum of five years' imprisonment. Finally, Congress left this regime predominately under the supervision of the FEC, an expert agency steeped in the practical realities of modern politics and with the ability to set uniform standards across the Nation.

By prosecuting Hunter under Sarbanes-Oxley's anticipatory obstruction of justice provision, the government would topple Congress's careful balance in the FECA. Section 1519 was not designed to avoid chilling the First Amendment rights of every member of and candidate for Congress—it "was drafted to prevent corporate document shredding." *United States v. Katakis*, 800 F.3d 1017, 1030 (9th Cir. 2015). Under the government's theory, even the most miniscule false statement in a FEC filing constitutes a 20-year offense regardless of the amount of funds involved. As a practical matter, the government's theory dissolves the FECA's established protections and procedures for campaign finance compliance and renders the FEC's expert judgment all but irrelevant. Perhaps most important, applying Section 1519 as the government would here has the effect of eliminating the FECA's minimum threshold for criminal violations while radically enlarging the maximum sentence for conduct that Congress has soundly placed in the regulatory discretion of the FEC.

That is what has happened in this very case. In addition to passively receiving the

reports at issue in the ordinary course of business, the indictment alleges in paragraph 21, sub-paragraph 16 (which was not incorporated into Counts 45-57), that “the FEC highlighted what appeared to be the ‘personal use of campaign funds’ and warned [Hunter] that it might consider taking further legal action.” Rather than permitting the FEC to determine whether Hunter in fact converted campaign funds to his personal use or inaccurately reported certain expenditures to the FEC, the prosecution substituted its own interpretation of the FECA’s reporting requirements and unilaterally decided that the reports at issue violate the FECA according to the prosecution’s self-generated reporting standard (a standard that remains known only to the government).

If allowed, that substitution would leave every politician, whether aspiring or incumbent, vulnerable to indictment because, according to one of 93 U.S. Attorney’s Offices around the country, they made the wrong choice in how to characterize an otherwise legitimate campaign expenditure. In addition to upsetting Congress’s carefully crafted framework for enforcing the regulation of core political activity, such elasticity in reporting standards at the discretion of prosecutors across the country would deprive all candidates and politicians of fair notice of what the law is and foster discriminatory enforcement of the law. That sort of “compliance first, standard later” regime would turn the constitutional guarantee of due process on its head, and the government cannot justify this type of unconstitutional application of Section 1519.

The discussion below proceeds as follows: First, Hunter addresses the legal and regulatory regime created by the FECA, and how application of Section 1519 to campaign disclosure reports would unsettle the careful balance Congress struck in the FECA. Second, Hunter contends that Section 1519 is unconstitutionally vague as applied by the government in the instant matter and explains how the government’s continued use of Section 1519 to punish FECA violations could create a chilling effect on the core political activity that the FECA was designed to protect.

II. ARGUMENT

Federal Rule of Criminal Procedure 12(b)(3)(B)(v) allows for pretrial dismissal

1 based on the indictment's "failure to state an offense" when the motion to dismiss "can
 2 be determined without a trial on the merits." In ruling on a motion to dismiss an
 3 indictment for failure to state an offense, the district court is bound by the four corners
 4 of the indictment. *U.S. v. Boren* 278 F.3d 911, 914 (9th Cir. 2002). An indictment
 5 should be dismissed for failure to state an offense when, as here, "the specific facts
 6 alleged in the charging document fall beyond the scope of the relevant criminal statute,
 7 as a matter of statutory interpretation." *United States v. Carroll*, 320 F. Supp. 2d
 8 748,752 (S.D. Ill. 2004) (quoting *U.S. v. Panarella*, 277 F.3d 678, 685 (3d Cir.2002)).
 9 The Government's Application of Section 1519 to FEC Filings Upsets the Carefully
 10 Crafted Balance Congress created in the FECA.

11 Counts 45 through 57 of the indictment charge violations of 18 U.S.C. § 1519.
 12 Section 1519, which was enacted as part of the Sarbanes-Oxley Act of 2002, Pub. L.
 13 107-204, 116 Stat. 745 (July 30, 2002), provides:

14 Whoever knowingly alters, destroys, mutilates, conceals, covers up,
 15 falsifies, or makes a false entry in any record, document, or tangible object
 16 with the intent to impede, obstruct, or influence the investigation or proper
 17 administration of any matter within the jurisdiction of any department or
 18 agency of the United States or any case filed under title 11, or in relation to
 or contemplation of any such matter or case, shall be fined under this title,
 imprisoned not more than 20 years, or both.

19 The indictment alleges that certain false entries were made in reports filed with the FEC,
 20 with the intent to impede, obstruct or influence the proper administration of a matter
 21 within the jurisdiction of the FEC and FBI.

22 **A. In Order to Safeguard the Separation of Powers and Core Political Speech**
 23 **Protected by the First Amendment, Congress Created a Comprehensive**
 24 **Administrative, Civil and Criminal Regulatory Structure in FECA to**
Govern Campaign Finance Disclosures.

25 When Congress decided to revamp the federal government's election laws in the
 26 1970s, it was well aware of the dangers posed by regulation in this area. In particular,
 27 Congress saw the potential for election laws to be manipulated as a weapon for partisan
 28 warfare against other branches of government. *See, e.g.*, H.R. Rep. No. 94-917 (Mar.

17, 1976) at 3 (“[E]lection campaigns are the central expression of this country’s democratic ideal. It is therefore essential in this sensitive area that the system of administration and enforcement enacted into law does not provide room for partisan misuse.”).

Congress also could not miss the serious First Amendment concerns with regulating election campaigns. “[I]t can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). The FECA’s regulation of campaign contributions and expenditures “operate[s] in an area of the most fundamental First Amendment activities” because “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.” *Buckley*, 424 U.S. at 14. As the Supreme Court recognized in *Buckley*, the same is true of *disclosures* about contributions and expenditures; “compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights.” *Id.* at 66. Disclosure requirements are accordingly subject to a “strict test” and must “directly serve substantial governmental interests.” *Id.* at 66, 68. Although the compelled disclosure of expenditures may be justified in some respects by the need to “provide[] the electorate with information as to . . . how [political campaign money] is spent” and to deter corruption “by exposing large . . . expenditures to the light of publicity,” *id.* at 66-67, the constitutional concerns remain. *See id.* at 64 (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”).

In this sensitive area, Congress crafted an “intricate statutory scheme” in the FECA “to regulate federal election campaigns.” *Id.* at 12. Congress later created an independent agency—the Federal Election Commission—with “primary and substantial responsibility for administering and enforcing” the Federal Election Campaign Act. *Id.* at 109. In addition to being free from direct supervision by the executive branch, the

Commission includes no more than three Commissioners from each party to prevent partisan domination. 52 U.S.C. § 30106(a)(1). Enforcement action requires the agreement of at least four Commissioners, 52 U.S.C. § 30109(a)(2), (4)(A)(i), (5)(C), (6)(A), so that any enforcement requires bipartisan agreement that dilutes the threat to the separation of powers. Congress’s design “g[a]ve the Federal Election Commission more extensive and flexible civil enforcement and regulatory powers, as well as to provide for a more balanced and equitable operation of these laws.” 94th Cong., 2d Sess., Cong. Rec. 12181 (May 3, 1976); *Buckley*, 424 U.S. at 141 (“Congress viewed these broad powers as essential to the effective and impartial administration of the entire substantive framework of the Act.”). Indeed, Congress assigned to the FEC the “exclusive” authority for civil enforcement of the nation’s campaign finance laws. 52 U.S.C. § 30107(e).

1. Congress knew that campaign disclosure mistakes were inevitable.

The nature of modern campaigning means that errors in campaign disclosures are inevitable. The FECA requires disclosures for each committee’s “receipts and disbursements.” 52 U.S.C. § 30104(a)(1). In a typical campaign, those rules can require hundreds of expenditures to be disclosed in a single quarterly reporting period. For many politicians, including most members of the House, the campaign season is ceaseless, and the campaign must keep track of never-ending expenditures. Furthermore, expenditures often require difficult judgment calls. For example, the FECA allows virtually any sort of expenditure so long as it is not a “personal” expense. § 30114(b)(1). But even the determination as to what constitutes a “personal” or a lawful campaign purpose depends on a variety of facts and circumstances requiring a “case-by-case” evaluation. 11 C.F.R. § 113.1(g)(1)(ii).

In addition, the FECA provides no guidance on how to characterize a given expenditure nor does it establish any metrics by which a candidate or his campaign committee can determine when an expense incurred with an individual satisfies the section 30114(b)’s “irrespective test.” *See* 52 U.S.C. § 30104(b)(5)(A) (requiring

disclosure of the recipient, “date, amount, and purpose of [each] operating expenditure”); *See also* 52 U.S.C. § 30114(b).

The FEC acknowledges that it has a role in “clarifying the law,” *see* http://www.fec.gov/pages/brochures/fecfec.html#Clarifying_Law, but the FEC’s approach is to encourage cooperative discussions with committees to achieve the disclosures it considers necessary. *See* FEC Statement of Policy: “Purpose of Disbursement” Entries for Filings with the Commission, 72 Fed. Reg. 887, 888 (Jan. 9, 2007) (“[I]f a committee uses a description that is listed as lacking sufficient detail, a [Reports Analysis Division] analyst may review the report more closely but the Commission would not automatically take any particular action. In most instances, the Commission will merely contact the reporting committee and the committee may then amend its report.”).

When it enacted and amended the FECA throughout the 1970s, Congress knew that complex practical realities of campaigning would create problems for disclosure issues requiring some means of resolution. As one Representative observed in 1971, there would be “endless questions arising from factual situations which candidates, and committee treasurers, could be confronted with.” H.R. Rep. 92-564, at 27 (Rep. Dickinson) (1971) (criticizing an earlier FECA bill, which proposed liability for non-willful expenditure reporting violations). Even the Commissioners disagree about how to characterize expenditures. *See, e.g., Charles Boustany, Jr. MD for Congress*, MUR 6698 (Feb. 23, 2016) (dividing 3-3 and therefore not pursuing enforcement action based on an alleged mischaracterization of the purpose of an expenditure and failure to disclose an “ultimate payee”).

2. Congress created a regulatory regime that accounts for the inevitability of disclosure errors in modern political campaigns.

By design, the FECA was enacted to avoid fragmented enforcement of campaign finance and expenditure requirements, the kind of arbitrary and disjointed enforcement that is occasioned by the differing views and standards applied by individual

1 prosecutors in the nation's 93 U.S. Attorneys' offices. Prior to 1971, the Department of
 2 Justice enforced the election laws via a few restrictions in the Federal Corrupt Practices
 3 Act located in Title 18. As a result, "enforcement responsibility was fragmented, and
 4 the line between improper conduct remediable in civil proceedings and conduct
 5 punishable as a crime blurred." H.R. Rep. No. 917, 94th Cong., 2d Sess. 3, U.S. Code
 6 Cong. & Admin. News 1976, p. 929. Congress moved those offenses from Title 18 to
 7 the FECA and put them under the purview of the newly created Federal Election
 8 Commission. Federal Election Campaign Act of 1976, Pub. L. No. 94-283, §§ 112,
 9 201(a), 90 Stat. 496 (1976).

10 As reconstituted in 1976, the FEC is a bipartisan expert independent agency
 11 designed "to interpret, advise [and] provide needed certainty to the candidates with
 12 regard to the complexities of the Federal Election law." Statement of President Ford,
 13 H.D. No. 94-371 (Feb. 17, 1976) at 1. *See also* 52 U.S.C. § 30106(a)(1). The FEC is
 14 structured and constituted such that it requires agreement from members of both parties
 15 to enforce the FECA against a candidate. 52 U.S.C. § 30109(a)(2), (4)(A)(i), (5)(C),
 16 (6)(A). And unlike the U.S. Attorneys' Offices, which might produce 93 different
 17 interpretations of the same statute and relevant regulations, the FEC can give candidates
 18 clear and uniform notice of the election laws it administers. *See* Hearing before the
 19 Subcommittee on Privileges & Elections, 94th Cong., 2d Sess. (Feb. 18, 1976), at 86
 20 ("We must have a commission to assist the over 1,000 Federal candidates, their staffs,
 21 and the network of volunteers all of whom need the guidance of an independent
 22 commission to understand and abide by the mandates of the sweeping and
 23 often complex reforms we have written into the campaign law.") (Sen. Mondale);
 24 *see also* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the*
 25 *Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum.
 26 L. Rev. 1093, 1121 (1987) ("When national uniformity in the administration of national
 27 statutes is called for, the national agencies responsible for that administration can be
 28 expected to reach single readings of the statutes for which they are responsible and to

enforce those readings within their own framework.”).¹

Congress also recognized that candidates, Representatives, and Senators could not themselves realistically track and disclose all the contributions and expenditures reportable under the FECA. Indeed, holding candidates liable for such reports would discourage them from campaigning in the first place because, realistically, attention to such administrative detail is impossible in the midst of the constant fundraising and campaigning that marks modern political life.² Instead, the FECA puts the burden of reporting campaign cash flows on a professional class of campaign administrators, namely the treasurers of political committees. *See* 52 U.S.C. § 30104(a)(1) (“Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.”). In fact, even though treasurers are often political committee compliance experts, the FECA does not require treasurers to report expenditures perfectly. Rather, a

¹ The Justice Department itself recognizes the importance of having national standards in campaign finance cases: “The Department’s consultation requirements for election crime matters are designed to ensure that national standards are maintained for the federal prosecution of election crimes, that investigative resources focus on matters that have prosecutive potential, and that appropriate deference is given to the FEC’s civil enforcement responsibilities over campaign financing violations.” *Federal Prosecution of Election Offenses* 16 (7th ed. May 2007). We are not aware of the existence or extent of any consultation in this case with the Public Integrity Section of the Department of Justice, under the authority of which this manual was promulgated or deference to the FEC.

² *See* Rep. Tim Roemer, Why Do Congressmen Spend Only Half Their Time Serving Us? *Newsweek* (July 29, 2015), available at <http://www.newsweek.com/why-do-congressmen-spend-only-half-their-time-serving-us-357995>:

“In 1990, I raised \$850,000 in my campaign for Congress. Between 1986 and 2012, the average cost of a Senate race increased 62 percent; the average cost of a Congressional seat increased a whopping 344 percent. In 2012, House incumbents raised an average of \$2,400 per day in the two-year cycle. Senate incumbents raised an average of more than \$4,700 per day over six years.

How much of members’ actual time is devoted to ‘dialing for dollars’? They are generally hard-working, honest, type A personalities, so in a typical 10-hour day, they might dedicate three hours. In election cycles during the heat of battle, it might escalate to more than half of their time.”

1 treasurer's reports comply with the FECA's disclosure requirements as long as "best
2 efforts have been used to obtain, maintain, and submit the information required by this
3 Act." 52 U.S.C. § 30102(i). Because of the burden of tracking and disclosing each
4 expenditure, Congress requires only a bare-bones description of its purpose. *See* 52
5 U.S.C.A. § 30104(b)(5) (requiring disclosure of the name and address of the recipient of
6 each committee disbursement, "together with the date, amount, and purpose of such
7 [disbursement]"); H.R. Rep. No. 96-422 (1979), at 18 ("[T]he purpose requirement will
8 be satisfied by a short statement or description, no more than one or two words in most
9 cases, of why the money was spent.").

10 Congress reserved criminal enforcement of the election law only for the most
11 culpable acts by, among other steps, requiring the most demanding mens rea for
12 criminal FECA violations. For violations involving "the making, receiving, or reporting
13 of any contribution, donation, or expenditure," there is *no criminal liability* unless the
14 violation is committed "knowingly and willfully." § 30109(d)(1)(A). As the Department
15 of Justice's election crimes manual recognizes, the FECA's "words of specific criminal
16 intent require proof that the offender was aware of what the law required, and that he or
17 she violated that law notwithstanding that knowledge, i.e., that the offender acted in
18 conscious disregard of a known statutory duty or prohibition." *Federal Prosecution of*
19 *Election Offenses* 135 (7th ed. May 2007) (citing *United States v. Curran*, 20 F.3d 560
20 (3d Cir. 1994); *Nat'l Right to Work Comm. v. FEC*, 716 F.2d 1401 (D.C.
21 Cir. 1983); *AFLCIO v. FEC*, 628 F.2d 97 (D.C. Cir. 1980)), available
22 at [https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-](https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-rvs0807.pdf)
23 [rvs0807.pdf](https://www.justice.gov/sites/default/files/criminal/legacy/2013/09/30/electbook-rvs0807.pdf). Indeed, the Department's own manual acknowledges that violations of the
24 FECA that are "committed with lesser intent . . . are not federal crimes." *Id.* at 135
25 n.50. Instead, "[t]hey are subject to civil and administrative enforcement by the [FEC]." *Id.*;
26 *see also supra* at 9.

27 Congress also crafted the FECA to encourage conciliation rather than
28 prosecution. If the FEC finds probable cause that a violation occurred, it is required,

1 “for a period of at least 30 days, to correct . . . such violation by informal methods of
2 conference, conciliation, and persuasion, and to enter into a conciliation agreement with
3 any person involved.” § 30109(a)(4)(A)(i). A conciliation agreement is not only “a
4 complete bar to any further action by the Commission,” *id.*, but it also serves as a
5 defense to a criminal prosecution and a basis for a more lenient sentence “[i]n any
6 criminal action brought for a violation of any provision of [the FECA],” § 30109(d)(2)-
7 (3).

8 Congress also limited criminal enforcement of FECA violations by restricting
9 prosecutions to violations involving large amounts of money. *See* S. Rep. No. 94-677
10 (1976), at 3 (The FECA “provide[s] criminal penalties for substantial violations and
11 civil penalties and disclosure for less substantial violations.”). Disclosure violations
12 involving less than \$2,000 are not subject to criminal prosecution at all, and violations
13 involving less than \$25,000 are a misdemeanor. § 30109(d)(1)(A)(ii). Even for the most
14 significant FECA violations, the statutory maximum is five years. § 30109(d)(1)(A)(i).
15 This graduated structure accounts for the public’s interest in “exposing large . . .
16 expenditures to the light of publicity,” *Buckley*, 424 U.S. at 66-67 (emphasis added),
17 while ensuring that there is breathing room to avoid chilling campaign expenditures that
18 are protected by the First Amendment.

19 **B. Applying Section 1519 Here Would Displace Congress’s Tailor-made**
20 **Scheme with an Offense that has Lesser Proof Requirements and a Much**
21 **Greater Penalty.**

22 Unlike the FECA’s elaborate system that is carefully calibrated for how
23 campaigns actually work, Section 1519 of Title 18 says nothing about campaign
24 finance. Instead, it “was drafted to prevent corporate document shredding.” *United*
25 *States v. Katakis*, 800 F.3d 1017, 1030 (9th Cir. 2015). Applying Section 1519 to a
26 candidate based on a committee’s disclosures would disrupt in numerous ways
27 Congress’s delicate balance between protecting First Amendment rights and enforcing
28 the campaign finance laws.

First, applying Section 1519 in conjunction with § 2(b) to a candidate would be

1 an end-run around the treasurer's reporting responsibilities. Under the FECA, it is the
 2 treasurer—not the candidate—who must document and verify expenditures. The
 3 treasurer is assigned this responsibility but is also protected by the “best efforts” safe
 4 harbor established by FECA and discussed above. But under the government's view, the
 5 FECA's explicit assignment of responsibility to the treasurer and the best efforts
 6 protection becomes irrelevant. Anyone submitting a “false” bill to a political committee
 7 would violate Section 1519 by “causing” the committee to record the false expenditure
 8 in its books and “causing” the treasurer to report the false expenditure in its disclosure
 9 reports to the FEC. *Cf. United States v. Curran*, 20 F.3d 560, 570 (3d Cir. 1994)
 10 (“Although Section 1001 is broad in its scope, it is not an all-encompassing counterpart
 11 of underlying agency reporting obligations. To read it as the government contends here,
 12 would in effect broaden the reporting duty imposed on campaign treasurers to be
 13 applicable to contributors as well. We find no indication that Congress intended such an
 14 expansion of its regulatory scheme.”).

15 Second, the indictment charges a lower mens rea than would apply to a criminal
 16 violation of the FECA. Whereas violations of the FECA's reporting rules can only be
 17 prosecuted if they are committed “knowingly *and willfully*,” § 30109(d)(1)(A)
 18 (emphasis added), Counts 45-57 of the indictment in this case charge only “knowingly,”
 19 which is the mens rea requirement stated in Section 1519. Knowledge is a lesser mens
 20 rea requirement and, in contrast to “willfully,” does not require the government to show
 21 that the defendant knew his actions were illegal. *See* 9th Circuit Model Jury Instruction
 22 5.6 (“Knowingly – Defined”) (“An act is done knowingly if the defendant is aware of
 23 the act and does not [act] [fail to act] through ignorance, mistake, or accident. [The
 24 government is not required to prove that the defendant knew that [his] [her] acts or
 25 omissions were unlawful.]”). As discussed above, the “willfully” standard in the FECA
 26 is part of Congress's design to protect core political speech. The substitution of
 27 Section 1519 for an FECA crime would lead to the paradoxical result that a Title 18
 28 offense aimed at corporate document shredding (1519) could be used to supply a four-

1 fold increased sentence over that provided by FECA for conduct that could not even be
 2 criminal under the FECA (where it was committed only knowingly but not willfully).
 3 Congress could not have intended such an odd and dangerous result.

4 Third, the “protection for persons who enter into and adhere to conciliation
 5 agreements” only applies to alleged violations of the FECA itself. S. Rep. No. 94-677
 6 (1976), at 3. If allowed to proceed under Section 1519 instead of the FECA, the
 7 government would dramatically reduce the burden of proof that Congress thought
 8 appropriate for this notoriously difficult area of the law.

9 Perhaps most important, applying Section 1519 would eliminate the FECA’s
 10 minimum threshold for criminal violations while radically enlarging the maximum
 11 sentence. As amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), P.L.
 12 107-155, 116 Stat. 81 (Mar. 27, 2002), the FECA does not allow any criminal charges
 13 for violations less than \$2,000, and only creates a misdemeanor offense for violations
 14 less than \$25,000. This carefully structured penalty scheme does not simply reflect
 15 relative assessments of culpability, it also leaves critical breathing room for the First
 16 Amendment and separation of powers. *NAACP v. Button*, 371 U.S. 415, 433 (1963)
 17 (“First Amendment freedoms need breathing space to survive”). Section 1519, by
 18 contrast, has no monetary thresholds. Its 20-year hammer would drop as hard on a
 19 committee report that knowingly inflated expenditures by \$1 as one that did so by \$1
 20 million.³ *Cf. United States v. Santos*, 553 U.S. 507, 517 (2008) (finding “no explanation
 21

22 ³ It is no answer in this context to claim that such matters could be taken into
 23 consideration at sentencing. Congress crafted the FECA to allow for the proper exercise
 24 of the First Amendment rights and other constitutional protections, and it clearly did not
 25 intend that Members run the gauntlet of potential federal investigation and prosecution
 26 every quarterly reporting cycle for potential false statements relating to small dollar
 27 amounts. Furthermore, the mere ability to charge violations of Section 1519 in this
 28 context would give federal prosecutors extraordinary coercive power over members of a
 coequal branch. *See* Tr. of Oral Arg. 31:21-23, *Yates v. United States*, No. 13-7451
 (“‘Look, if we prosecute you you’re facing 20 years, so why don’t you plead to a year,
 or something like that.’ It’s an extraordinary leverage that the broadest interpretation of

for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime” through the money laundering statute).

C. There is No Established Practice of Applying Section 1519 to Police Campaign Disclosure Reports Filed with the FEC.

In light of all these conflicts with the carefully calibrated FECA, it is no surprise that prosecutions for campaign disclosure violations under Section 1519 are exceedingly rare. In fact, the Department of Justice manual—which was last revised in 2007 more than five years after Section 1519 was enacted—does not even mention Section 1519 as a basis for false-statement offenses related to election disclosures. *Cf. Federal Prosecution* 185-88. Similarly, the FEC’s Form 3 (“Report of Receipts and Disbursements”) – the form that Hunter allegedly caused to contain false information – does not mention Section 1519 as a consequence of misstatements. Instead, FEC Form 3 states only that “[s]ubmission of false, erroneous, or incomplete information may subject the person signing this Report to the penalties of 52 U.S.C. § 30109”—that is, the FECA. *See* FEC Form 3, available at <http://www.fec.gov/pdf/forms/fecfrm3.pdf> (emphases added).⁴

The government’s theory is not only inconsistent with Congress’s careful approach to regulating campaign disclosures—its attempt to apply Section 1519 to Hunter would violate the Constitution.

D. The Passive Receipt of Campaign Disclosures is not a “Matter” Within the Meaning of § 1519

The indictment fails to specify the “matter” that Hunter intended to impede, obstruct, or influence through the routine filing of the campaign disclosure reports identified in Counts 45-57. The indictment does not allege any ongoing FEC or FBI

this statute would give Federal prosecutors.”) (Roberts, C.J.).

⁴ The failure of these authorities to even list Section 1519 as a possible penalty only reinforces the vagueness and lack-of-notice concerns discussed below. *See infra* at Part

1 investigation or audit that Hunter was aware of at the time his campaign submitted these
 2 reports. This omission is fatal to the indictment, as recognized by the Supreme Court in
 3 a recent case analyzing a similar obstruction of justice provision.

4 Section 1519 does not penalize a mere false entry in a record or document. Such
 5 an entry is only criminalized where it is made “with the intent to impede, obstruct, or
 6 influence the investigation or proper administration of *any matter* within the jurisdiction
 7 of any department or agency of the United States” 18 U.S.C. § 1519. The FEC’s
 8 passive, routine receipt of campaign filings, the only relevant conduct alleged in the
 9 indictment, is not a “matter” within the meaning of § 1519. In *McDonnell v. United*
 10 *States*, the Supreme Court held that the meaning of the term “matter” in the federal
 11 bribery statute should be given a “confined interpretation,” and limited to a “formal
 12 exercise of governmental power that is similar in nature to a lawsuit before a court, a
 13 determination before an agency, or a hearing before a committee.” 136 S. Ct. 2355,
 14 2372 (2016). In that case, the Supreme Court rejected the government’s argument that
 15 “nearly any activity by a public official” constitutes a “matter,” including mere
 16 “workaday functions.” *Id.* at 2368.

17 The Supreme Court has applied similar reasoning to an analogous tax obstruction
 18 statute. That statute, 26 U.S.C. § 7212(a), makes it a felony “corruptly or by force” to
 19 “endeavo[r] to obstruct or impede the due administration of” the Internal Revenue
 20 Code. In *United States v. Marinello*, the Supreme Court held that:

21 “[D]ue administration of [the Tax Code]” does not cover routine
 22 administrative procedures that are nearly universally applied to all
 23 taxpayers, such as the ordinary processing of income tax returns. Rather,
 24 the clause as a whole refers to specific interference with targeted
 25 governmental tax-related proceedings, such as a particular investigation or
 26 audit.

27 138 S. Ct. at 1104. The Supreme Court held that this obstruction statute applied only to
 28 “specific, targeted acts of administration,” *id.* at 1106, which did not include “routine,
 day-to-day work carried out in the ordinary course by the IRS, such as the review of tax
 returns,” *id.* at 1110. Instead, the Court held that the statute required “a particular

1 administrative proceeding, such as investigation, an audit, or other targeted
2 administrative action.” *Id.* at 1109.

3 Pursuant to the cabined definition of “matter” set out in *McDonnell* and the
4 limited reach given to an analogous statute and enforcement regime in *Marinello*, it is
5 not sufficient under Section 1519 for the government to merely allege that Hunter
6 caused the passive receipt of routine disclosures by the FEC. This conclusion is
7 particularly appropriate in the context of the FECA, in that, as noted, giving
8 Section 1519 a broad interpretation would fundamentally undermine the carefully
9 crafted campaign enforcement and penalty regime Congress created. Accordingly, the
10 Court should dismiss Counts 45-57 because the indictment fails to allege any “matter,”
11 such as an FEC or FBI investigation, that Hunter sought to obstruct through his
12 campaign’s filing of routine campaign finance disclosures.

13 The FEC did not notified the Hunter campaign that a complaint had been filed
14 alleging violations of the FECA by his campaign until May 5, 2016. Thus, consistent
15 with *McDonnell* and *Marinello*, there was no “matter” regarding Hunter’s FEC Form 3
16 reports until May 5, 2016. Counts 45-55 concern FEC Form 3 reports filed by the
17 Hunter Campaign between July 15, 2013 and April 15, 2016 and charge that Hunter
18 filed each of the reports *with the intent* to obstruct the investigation of matters within the
19 jurisdiction of the FEC. Accordingly, the Court must, at a minimum, dismiss counts 45-
20 55 because they concern FEC Form 3 reports filed by the Hunter Campaign before any
21 “matter” concerning Hunter’s alleged misuse of campaign funds existed.

22 **E. Section 1519 is Unconstitutionally Vague as Applied By the Government.**

23 The government’s expansive interpretation of Section 1519 is unconstitutionally
24 vague as applied to Hunter in the instant matter because it allows arbitrary and
25 discriminatory enforcement in an arena already ripe for political gamesmanship, violates
26 Hunter’s First Amendment rights, and infringes upon the separation of powers that
27 FECA was designed to protect.
28

1 **1. The government’s expansive application of Section 1519 deprives**
 2 **candidates and politicians of due process by forcing them to comply**
 3 **with the unannounced reporting standards of nearly a hundred**
 4 **different prosecutorial offices.**

5 “Due process requires that a criminal statute provide adequate notice to a person
 6 of ordinary intelligence that his contemplated conduct is illegal, for ‘no man shall be
 7 held criminally responsible for conduct which he could not reasonably understand to be
 8 proscribed.’” *Buckley*, 424 U.S. at 77 (quoting *United States v. Harris*, 347 U.S. 612,
 9 617 (1954)). “Where First Amendment rights are involved, an even ‘greater degree of
 10 specificity’ is required.” *Id.* at 77 (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)).
 11 A penal statute like Section 1519 is void for vagueness when it fails to “define the
 12 criminal offense with sufficient definiteness that ordinary people can understand what
 13 conduct is prohibited” as well as when the offense “encourage[s] arbitrary and
 14 discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The
 15 requirement that the legislature “establish minimal guidelines to govern law
 16 enforcement,” is “the more important aspect of the vagueness doctrine.” *Id.* at 357-58.
 17 That is because “the greatest danger of abuse of prosecuting power” is the prosecutor’s
 18 ability to “pick[] some person whom he dislikes or desires to embarrass, or select[]
 19 some group of unpopular persons and then look[] for an offense.” Robert H. Jackson,
 20 The Federal Prosecutor, 31 Am. Inst. of Crim. L. & Criminology 3, 5 (1940-41). The
 21 Fifth Amendment accordingly does not tolerate criminal laws that threaten to cast a “net
 22 large enough to catch all possible offenders” while leaving “it to the courts to step inside
 23 and say who could be rightfully detained.” *United States v. Reese*, 92 U.S. 214, 221
 24 (1876); see also *Kolender*, 461 U.S. at 358 (vagueness doctrine does not “permit a
 25 standardless sweep [that] allows policemen, prosecutors, and juries to pursue their
 26 personal predilections”).

27 Vagueness concerns are amplified when penal statutes are deployed, as here,
 28 with the “potential for arbitrarily suppressing First Amendment liberties.” *Kolender*,
 461 U.S. at 358. In those circumstances, “more precision in drafting may be required

1 because of the vagueness doctrine in the case of regulation of expression,” *Parker v.*
 2 *Levy*, 417 U.S. 733, 756 (1974), and courts demand a “greater degree of specificity”
 3 than in other contexts, *Smith*, 415 U.S. at 573; *see also Vill. of Hoffman Estates v.*
 4 *Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (“If . . . the law interferes with the
 5 right of free speech or of association, a more stringent vagueness test should apply.”).

6 As applied to the campaign filings of a sitting United States congressman,
 7 Section 1519 threatens to create the sort of “net large enough to catch all possible
 8 offenders” that vagueness doctrine forbids. *Reese*, 92 U.S. at 221.

9 **2. Applying Section 1519 to Violations of the FECA would grant**
 10 **prosecutors too much discretion and risk a chilling effect on first**
 11 **amendment activities.**

12 All political committees must file FEC reports. 52 U.S.C. § 30104(a)(1). Given
 13 the messy realities of the modern federal campaign, there will likely be many errors that
 14 could support a prosecution on the government’s theory in this case—in all likelihood,
 15 far more errors than could ever be prosecuted. But prosecutors will have to select on
 16 some basis. Deployed in this context, Section 1519 “furnishes a convenient tool for
 17 harsh and discriminatory enforcement by local prosecuting officials, against particular
 18 [candidates] deemed to merit their displeasure.” *Kolender*, 461 U.S. at 360.
 19 This gives prosecutors extraordinary leeway to arbitrarily pick candidates to target
 20 under Section 1519, notwithstanding the FEC’s well-documented ability to bring civil
 21 enforcement measures to correct false disclosure entries. *See, e.g.*, MUR 6977 (House
 22 Majority PAC) (Mar. 28, 2016 conciliation agreement regarding failure to disclose
 23 seven expenditures); ADR 772 (Newt 2012) (Feb. 23, 2016 settlement regarding
 24 misidentification of a campaign debt as “travel”); MUR 5408 (Sharpton 2004) (Apr. 2,
 25 2009 conciliation agreement regarding material misstatements of receipts and
 26 disbursements); MUR 5808 (Planned Parenthood Action Fund Inc. PAC) (Mar. 6, 2007
 27 conciliation agreement regarding failure to report receipts and disbursements); ADR
 28 209 (Bruderly for Congress) (Feb. 18, 2005 settlement regarding failure to report
 receipts and disbursements); ADR 163 (Sullivan for Congress) (June 9, 2003 settlement

1 regarding alleged misreporting of campaign debts); MUR 4328 (Democratic-
 2 Republican-Independent Voter Education Committee) (July 14, 2000 conciliation
 3 agreement regarding misidentification of an independent expenditure as an “operating
 4 expense”).

5 The various cases just cited resulted in FEC action and conciliation agreements;
 6 this case was already the subject of FEC action yet the prosecutors chose to insert
 7 themselves into the FEC’s domain and charge numerous criminal offenses based on
 8 conduct usually resolved by the FEC (or the House). In fact, the FEC process has been
 9 used to resolve errors more significant than those alleged here. *See, e.g.*, MUR 6204
 10 (Dallas Cnty. Republican Party) (Oct. 15, 2009 conciliation agreement regarding fifty
 11 expenditures worth \$215,000 that failed to disclose the correct purpose). Nonetheless,
 12 the government singled out Hunter for this divergent treatment throughout its
 13 investigation and prosecution. It is clear that the government’s view of the scope of
 14 Section 1519 invites and encourages just this sort of arbitrary and discriminatory
 15 enforcement action.

16 The vagueness concerns are unusually acute here because applying Section 1519
 17 would invite the executive branch to chill core political speech and erode the separation
 18 of powers through excessive meddling in the minutiae of a member of Congress’s FEC
 19 reporting without the congressionally designed protections of the FECA. *See* Cong.
 20 Rec. 6942 (Mar. 17, 1976) (testimony of Sen. Claggett) (When expenditures and
 21 contributions are “subjected to regulation, especially with criminal sanctions, the
 22 inhibiting effect on political expression is acute.”). Campaign expenditures are
 23 necessary for the “[d]iscussion of public issues and debate on the qualifications of
 24 candidates [that] are integral to the operation of the system of government established
 25 by our Constitution.” *Buckley*, 424 U.S. at 14. Anticipating errors and omissions in the
 26 FEC reports of most federal elected officials, Congress made appropriate
 27 accommodations. *See* 52 U.S.C. § 30102(i) (reports are in compliance with the FECA’s
 28 disclosure requirements as long as “best efforts have been used to obtain, maintain, and

1 submit the information required by this Act”).

2 Using Section 1519 in this manner, rather than the process envisioned by the
 3 FEC, allows every federal prosecutor across the land to make their own assessment
 4 regarding the adequacy of a disclosure. Not only does this approach threaten divergent
 5 applications of the law in this sensitive area, but it requires every candidate and
 6 politician to guess how to comply with prosecutors’ individualized reporting standards
 7 that are only announced after the reports are filed. Under the government’s theory in this
 8 case, the penalty for guessing wrong is a 20-year prison sentence. Furthermore, neither
 9 the FEC—whose Form 3 states that any misstatements are governed by the FECA—nor
 10 the DOJ—whose own manual omits Section 1519 from the list of applicable campaign
 11 disclosure crimes—gave any notice, much less the fair notice required for due process,
 12 that the 20-year felony in Section 1519 could apply.

13 Furthermore, the legislative history of Section 1519 demonstrates that Congress
 14 did not intend Section 1519 to be used in such a far reaching manner. At the time of its
 15 passage, several senators voiced their “concern that Section 1519, and in particular, the
 16 phrase ‘or proper administration of any matter within the jurisdiction of any department
 17 or agency of the United States’ could be interpreted more broadly than we intend,” Sen.
 18 Rep. 107-146 (2002), at 27 (Additional views of Sens. Hatch et al.)—precisely as the
 19 government has done here. Those senators clarified that “Section 1519 should be used
 20 to prosecute only those individuals who destroy evidence with the specific intent to
 21 impede or obstruct a pending or future criminal investigation, a formal administrative
 22 proceeding, or bankruptcy case.” *Id.* (emphasis added). The statute should be interpreted
 23 accordingly to prevent turning Section 1519 into a nearly universal false-statement
 24 statute. *See Yates v. U.S.*, 135 S. Ct. 1074, 1087 (2015) (“It is highly improbable that
 25 Congress would have buried a general spoliation statute covering objects of any and
 26 every kind in a provision targeting fraud in financial record-keeping.”).

1 **3. Under The Rule of Lenity, any Ambiguity as to Whether Congress**
 2 **Intended Section 1519 to Extend to FECA Violations Must Be**
 3 **Resolved Against the Government.**

4 The rule of lenity prohibits the government’s expansive interpretation of Section
 5 1519. “[W]hen there are two rational readings of a criminal statute, one harsher than the
 6 other, [courts] are to choose the harsher only when Congress has spoken in clear and
 7 definite language.” *McNally v. United States*, 483 U.S. 350, 359–60 (1987); *see*
 8 *also United States v. Thompson*, 484 F.3d 877, 881 (7th Cir. 2007) (The rule of lenity
 9 “insists that ambiguity in criminal legislation be read against the prosecutor, lest the
 10 judiciary create, in common-law fashion, offenses that have never received legislative
 11 approbation.”). Nothing about Section 1519 provides the necessary “clear and definite
 12 language” here.

13 Section 1519 is particularly susceptible to the application of the rule of lenity.
 14 The Supreme Court applied it to Section 1519 in *Yates* because the government urged a
 15 reading “that exposes individuals to 20-year prison sentences for tampering with any
 16 physical object that might have evidentiary value in any federal investigation into any
 17 offense, no matter whether the investigation is pending or merely contemplated, or
 18 whether the offense subject to investigation is criminal or civil.” 135 S. Ct. at 1088; *see*
 19 *also United States v. Ford*, 639 F.3d 718, 721–22 (6th Cir. 2011) (rule of lenity applied
 20 to an alleged § 1001 violation because “[t]he meaning of ‘any matter’ and ‘jurisdiction’
 21 requires interpretation of unspecific words at an extremely high level of abstraction”).

22 Here, the government still reads Section 1519 as the basis of a 20-year sentence
 23 for any misstatement related to anything that might be regulated by the federal
 24 government. The rule of lenity properly insists that Congress grant such an
 25 extraordinary power to prosecutors using language that is “clear and definite,” rather
 26 than opaque at best. *See Liparota v. United States*, 471 U.S. 419, 427 (1985) (The rule
 27 of lenity “strikes the appropriate balance between the legislature, the prosecutor, and the
 28 court in defining criminal liability.”).

III. CONCLUSION

Section 1519 is unconstitutionally vague as applied to the FEC disclosure reports of a sitting Member of Congress. Because the expenditures that must be reported under the FECA are so voluminous in modern federal campaigns—and therefore prone to misstatements—applying Section 1519 to FECA violations would place all federal elected representatives under a cloud of criminal suspicion. Particularly given the harsh maximum sentence, the statute would “furnish[] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular [candidates] deemed to merit their displeasure.” *Kolender*, 461 U.S. at 360. Even the threat of prosecution under those circumstances could well discourage vigorous campaigning or even running for office in the first place. Furthermore, charges of this nature brought by the executive branch could have a debilitating effect on the operation of a coordinate branch of government. Given the disturbing incentives created by applying Section 1519 in this context, the statute is void for vagueness, and violates the First Amendment and separation of powers as applied here.

In sum, the indictment does not properly allege that the charged conduct within Counts 45-57 was subject to the “proper administration” of a “matter” under FEC or FBI jurisdiction as properly construed for a Section 1519 offense, and the government’s expansive view of Section 1519’s application is unconstitutional as applied to Mr. Hunter’s campaign disclosure reports. As a result, the Court should dismiss counts 45-57 with prejudice for failure to state an offense.

Respectfully submitted,

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